92-81

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

STEPHEN B. ELLIS,

Petitioner,

vs.

THE HONORABLE SAMUEL K. SKINNER,
Secretary of Transportation, *et al.*,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the Fourteenth Amendment requires a state, in implementing a federal race-based, set-aside program – which permits the state to opt out of the race-based program – to conduct the inquiry set forth in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989)?

LIST OF PARTIES

Mr. Stephen B. Ellis (Mr. Ellis) was Plaintiff in the United States District Court for the District of Utah and Appellant before the United States Court of Appeals for the Tenth Circuit.

The following were Defendants in the United States District Court for the District of Utah and Appellees before the United States Court of Appeals for the Tenth Circuit: Samuel Skinner, in his official capacity as Secretary of Transportation (Mr. Skinner has since been replaced in his official capacity by Andrew H. Card, Jr.); Robert E. Farris, in his official capacity as the Administrator, Federal Highway Administration, United States Department of Transportation (Mr. Farris has since been replaced in his official capacity by Thomas D. Larson); Louis N. MacDonald, in his official capacity as the Regional Administrator, Federal Highway Administration; Eugene Findlay, individually, and in his official capacity as Director of the Department of Transportation of the State of Utah; and Mario Blanco, individually, and in his official capacity as Civil Rights Coordinator of the State of Utah Department of Transportation.

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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Review is sought of the opinion of the Tenth Circuit Court of Appeals, dated April 10, 1992, appearing at pages App. 25 to App. 35 of the Appendix. The unreported opinion, dated October 15, 1990, and the Order of the District Court, dated November 21, 1990, appear at pages App. 1 to App. 22 of the Appendix and at pages App. 23 to App. 24 of the Appendix, respectively.

JURISDICTION

Petitioner seeks review of the opinion and judgment issued by the Tenth Circuit Court of Appeals on April 10, 1992. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution is at issue in this Petition for *Writ* of *Certiorari*.

STATUTES INVOLVED

Statutes involved in this appeal are § 105(f) of the Surface Transportation Assistance Act of 1982 (STAA) and § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA).

STATEMENT OF THE CASE

On July 9, 1987, Mr. Ellis challenged, in the United States District Court for the District of Utah, the lawfulness of the implementation, by the Department of Transportation of the State of Utah (UDOT), of the Disadvantaged Business Enterprise (DBE) program for federally-funded highway projects promulgated in accordance with section 105(f) of STAA, section 106(c) of STURAA, and the U.S. Department of Transportation (DOT) implementing regulations at 49 C.F.R. Part 23. Mr. Ellis sought a declaratory judgment and permanent injunction asserting that the federal DBE program, as

applied by the UDOT, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Cross Motions for Summary Judgment were filed on November 13, 1989, and oral arguments conducted on June 8, 1990. On November 21, 1990, a Final Order was issued by the District Court granting Summary Judgment to the U.S. Government and denying Summary Judgment to Mr. Ellis.

Mr. Ellis filed a notice of appeal with the Tenth Circuit Court of Appeals on January 15, 1991. The matter was decided upon the briefs in an opinion dated April 10, 1992. This Petition for *Writ* of *Certiorari* follows.

STATEMENT OF FACTS

Mr. Ellis, a 76 year-old white male, has been engaged in specialty highway landscape subcontracting in the State of Utah since 1968. In 1983, he was honored as the Utah Associated General Contractors' "Subcontractor of the Year."

In 1980, the State of Utah first experimented with a race-based, set-aside program which set "goals" under which 2% to 3% of all contracting dollars were to be awarded to minority-owned or women-owned firms. In 1982, STAA was enacted by Congress, and in 1983, the UDOT implemented that program. Section 105(f) of STAA provides:

> Except to the extent that the Secretary determines otherwise, not less than 10 per centum of

> the amounts authorized to be appropriated under this act shall be expended with small business concerns owned and controlled by *socially and economically disadvantaged individuals* as defined by section 8(d) of the Small Business Act (15 U.S.C. section 637(d)) and relevant subcontracting regulations promulgated pursuant thereto.

(Emphasis added.)

Section 8(d) of the Small Business Act creates a presumption that certain racial groups are composed of "socially and economically disadvantaged individuals," including "Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities." 49 C.F.R. § 23.62.

STAA had separate "goals" for Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs) of 10% and 1%, respectively. The STAA program of awarding contracts based upon race continued with the passage, in 1987, of STURAA which combined the MBE and WBE "goals" into a single DBE "goal" of 10 percent.

As a result of the express provisions of STAA and STURAA and the presumptions of the Small Business Act, the federal government has established a race-based, set-aside program for the awarding of federal contracts.

Under STAA and STURAA, each state receiving federal highway construction funds must establish a 10% DBE plan. However, each state may apply to the DOT for a waiver of the federal 10% race-based, set aside. The ability of States, to which the 10% race-based, set aside

did not apply, to seek and to obtain a waiver from the DOT was a condition precedent to the passage of STAA and STURAA by Congress.[1]

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[1] During consideration by the 95th Congress of the Public Works Employment Act of 1977 (PWEA) – whose 10% minority set-aside provision was the exact language adopted in STAA and STURAA – floor debate makes clear that the set-aside was not intended to apply where local history and conditions were unsuitable. Congressman Mitchell of Maryland, who sponsored the 10% set-aside amendment, engaged in the following floor colloquy with Congressman Kazen of Texas:

> MR. KAZEN — All right. What happens in the rural areas where there are no minority enterprises? Will the 10 percent be held up in order to bring minority enterprises from somewhere else where there is no unemployment into a place where there is unemployment and there is no minority enterprise?
>
> MR. MITCHELL — In response to the gentleman's question, the answer is 'No.' . . . I would not expect to take my minority contractors from Maryland into Idaho to meet that State's requirement. That will not be an issue.
>
> MR. KAZEN — . . . [W]here there are no minority enterprise contractors then this provision would not be in effect; am I correct?
>
> MR. MITCHELL — That is absolutely correct, and that is done by administrative

(Continued on following page)

The UDOT implemented the federal DBE program in accordance with STAA, STURAA and DOT's implementing regulations. However, the UDOT never sought a waiver from the 10% race-based, set-aside despite the fact that less than 8% of Utahans are recognized minorities and that less than 2% of the firms available for subcontract work in Utah are minority-owned businesses.[2]

As a result of the UDOT 10% race-based, set-aside program, lower-bidding, non-minority subcontractors have been denied work solely on the basis of their race. On at least two occasions Mr. Ellis suffered such discrimination.

Mr. Ellis commenced this action in an effort to obtain relief, and to put an end to the use by the UDOT of what Mr. Ellis considers to be an unconstitutional use of a race-based, set-aside program.

(Continued from previous page)

action already on the books with all the agencies.

123 Cong. Rec. 1437 (Feb. 24, 1977).

[2] In 1984, the Utah Department of Employment Security determined that Utah had a total population of 1,613,000, of which the total minority population was 122,360, or about 7.6%. The "1987 Utah Contractor Directory," reveals that of the 6200 firms available for subcontract work in Utah only 106, or less than 2%, are DBEs.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS RAISES IMPORTANT CONSTITUTIONAL ISSUES.

This is an important challenge to the constitutionality of the implementation by a state of a race-based, set-aside program adopted by the U.S. Government. As a result, this is an important matter of first impression as to the exact relationship between the decisions of this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989).

Fullilove upheld the ability of Congress to adopt race-based, set-aside programs. *Croson* struck down a race-based, set-aside program adopted by a city. Unanswered in both cases is the question posed by the instant petition: what duties does the Constitution impose upon a state in the implementation of a federal race-based, set-aside program?

In *Fullilove*, in response to a facial challenge of a race-based, set-aside program upon which the program in the instant petition was based, this Court upheld the constitutionality of that federal program. However, this Court did so, in large part, because the federal statute contained a provision permitting a state to obtain a "waiver" from the application of the race-based, set-aside federal program.

A waiver provision, similar to the waiver provision at issue in *Fullilove*, exists in STAA and STURAA, the statutes implemented by the UDOT. However, notwithstanding the presence of the waiver provision, the UDOT

did not initiate any inquiry into whether the 10% race-based, set-aside program was constitutionally permissible in the State of Utah, and therefore whether a waiver should be obtained. Instead, the UDOT simply implemented that 10% race-based, set-aside program.[3]

The question posed by this petition is whether the State of Utah, in its implementation of a federal race-based, set-aside program, must comply with the U.S. Constitution. That is, must the State of Utah, as a result of the Fourteenth Amendment, determine whether the racial quotas are justified by "a compelling governmental interest" and whether the means chosen to effectuate that compelling interest are "narrowly tailored to the achievement of that goal," that is, "limited in scope and duration." *Wygant v. Jackson Board of Education, et al.*, 476 U.S. 267, at 285 (1986).[4]

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[3] The UDOT program is strictly a race-based program since the only basis for qualifying as a so-called "DBE" is race. For example, UDOT's DBE status application form does not include any reference to social or economic disadvantage. (Information for Determining Disadvantaged Business Enterprise Eligibility) Thus, the UDOT continues to presume, without any factual basis, that every minority, regardless of economic condition, is a qualified DBE. It is immaterial to the UDOT whether the minority was subjected to any state-sponsored discrimination.

[4] This is particularly the case in light of the command of this Court that the government has the burden of demonstrating that its use of a race-based classification is narrowly tailored so as to serve a compelling governmental interest. *Plyler v. Doe*, 457 U.S. 202, 217 (1982). Such a duty seems to compel an initial inquiry.

In the instant case, the District Court upheld the constitutionality of the implementation by the UDOT of the federal 10% race-based, set-aside program simply because the UDOT was participating in a federal program. The Court concluded that the UDOT was a "junior partner" of the federal government. As a result, the District Court held that the UDOT was not required to take further steps in implementing a race-based, set-aside program.

The analysis of the District Court is flawed. The State of Utah is not shielded from the provisions of the Constitution simply because Congress adopted a race-based, set-aside program. While such a program - like the program in *Fullilove* – may be upheld as constitutional in a facial challenge, the program does not survive an "as applied" challenge. Obviously, an aspect of the application of the program is whether it is constitutional.

Croson commands that a governmental unit conduct an inquiry in order to ascertain that its adoption and implementation of a race-based program meets the requirements of the Constitution.[5] While Congress may meet its constitutional duty in the adoption of a statute which uses race as the basis for government decision making – by the inclusion of a waiver provision which

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[5] As this Court made clear in *Croson*, a state must: (1) search for and find a history of state-sponsored discrimination; (2) assert the compelling state interest sought to be served by the race-based remedy; and (3) narrowly tailor the race-based remedy both as to: (a) the beneficiary of the racial bias, that is, applying the remedy to one who has been a victim of such state-sponsored discrimination; and (b) the duration of the use of the race-based remedy. *Croson*, 488 U.S. 469 (1989).

permits states to opt out of such a program – that does not mean that the provisions of the Fourteenth Amendment are forever thereafter irrelevant.

This Court has reviewed the proper use of the waiver provision at issue in the instant petition. In fact, as noted in *Croson*, it was the presence of the waiver provision which ensured the constitutionality of the Public Works Employment Act (PWEA) when challenged, facially, in *Fullilove*.[6] Thus, the waiver provision does not exist for administrative tidiness and nicety, but to ensure that the only basis that permits resort to a race-based standard – that is, to remedy prior state-sponsored discrimination – is not corrupted. This Court held that the waiver provision was to be used to prevent the unconstitutional application of the race-based remedy set forth in the PWEA.[7]

The legislative history of the waiver provision makes it clear that it was to be used to prevent the very abuse which is taking place in Utah.[8]

While STAA and STURAA permit the State of Utah to determine whether a race-based remedy is needed in Utah, and if needed, whether it should rise to the federal level of 10%, it is the Fourteenth Amendment of the U.S. Constitution which compels the State of Utah to make that decision in a constitutional manner. The constitutional method is set forth in *Croson*. The failure of the

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[6] *Croson* at 489.

[7] *Fullilove*, at 481-482.

[8] The legislative history set forth in footnote 1 describes the abuse which concerned Congress.

UDOT to investigate the constitutional applicability of the federal 10% quota and the failure of the State of Utah to apply for a waiver of that 10% quota would no doubt be subject to the denunciation leveled by Justice O'Connor against the City of Richmond:

> Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.
>
> * * *
>
> Under Richmond's scheme, a successful Black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.[9]

Yet for the District Court to read the waiver provision as it has is to render the waiver provision a nullity. It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Tel & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). The District Court has rendered the waiver provision of no force and effect. In an ironic and lamentable twist the waiver provision, the

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[9] *Croson*, at 508.

strength and force of which permitted this Court to uphold the constitutionality of the PWEA, has now been rendered a puny and inconsequential nonentity.

Finally, the District Court's application of the waiver provision creates a "Catch-22" which makes it impossible for any court to apply the commands of the Equal Protection Clause of the Fourteenth Amendment. Thus, statutes like STAA and STURAA pass constitutional muster in a facial challenge because the Congress has included a waiver provision under which an implementing state may seek an exemption from the race-based remedy of those statutes. At the same time, any attempt to ensure that a state applies the waiver provision in a constitutional manner – that is, in accordance with *Croson* – will be frustrated because the court can – as did the District Court here – declare that the state is a "junior partner" of Congress and need not apply for the waiver. This is surely not what this Court intended by its ruling in *Fullilove*, and it is exactly what this Court forbade in its ruling in *Croson*.

This Court must grant certiorari in order to end the Constitutional abuse now sanctioned by the decision below.

II. A TRUE, DIRECT, INTOLERABLE AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION BELOW AND DECISIONS RENDERED BY THIS HONORABLE COURT.

The Tenth Circuit Court concludes erroneously that there is an inexorable conflict between *Fullilove* and *Croson*, and that, in order to rule, it had to decide whether

it was the holding of this Court in *Fullilove* or *Croson* which applied.[10]

The Tenth Circuit Court thus misapprehends the holdings of this Court in *Fullilove* and *Croson*. *Fullilove* and *Croson* are not inconsistent and, in fact, must be read together in order to properly address the instant matter.

Fullilove was only a facial challenge to a federal program that was yet to be implemented.[11] This Court in *Fullilove* held that the statute was facially constitutional, in large part, because of the waiver provision which ensured that the program would not be applied where constitutionally impermissible. Since the challenge was only a facial one, this Court in *Fullilove* could not answer whether the program would be constitutional as implemented.

Croson, on the other hand, stands for the proposition that the program must be constitutional both facially and as applied and that governmental entities embarking upon a race-based program must adhere to the requirements of the Fourteenth Amendment.

The Tenth Circuit Court of Appeals relied, for its decision, upon the holding of this Court in *Fullilove*, concluding that *Croson* was inapplicable.[12] Yet *Fullilove*

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[10] App. at 29.

[11] *Fullilove* at 480.

[12] To resolve this appeal, we must decide whether failure to seek an administrative waiver places this case squarely within the parameters of the Supreme

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provides no support for the proposition that a federal program – even if facially constitutional – is also constitutional, as applied. *Fullilove* expressed no opinion as to whether the program would be upheld in an "as applied" challenge.

Fullilove certainly does not stand for any proposition which would permit the manner in which the UDOT implemented the federal program to be upheld: that is without regard to the racial composition of the State of Utah; without regard to the racial composition of the contractors in the Utah highway construction industry; without regard to whether there had been any history of state-sponsored discrimination in Utah; and without regard to the tailoring of the race-based remedy.

The assertion that *Fullilove* provides the guiding principles by which this matter must be resolved fails for three reasons. First, *Fullilove* stands only for a proposition totally irrelevant in the instant matter, that is, the ability of the U.S. Congress under certain, limited circumstances to adopt a race-based remedy. The ability of the U.S. Congress to adopt such a statute is not at issue here. What is at issue is the manner in which that program is implemented by a state, in this case, the State of Utah, and the UDOT.

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> Court's decision in *Croson*. . . . Therefore, we must decide whether Utah's failure to seek a waiver is equivalent to a local government enacting its own set-aside program, thus implicating the fact-finding requirements of *Croson*.

App at 32. *See* also the Decision of the District Court, App. at 6.

Second, *Fullilove* was only a facial challenge. The test of whether the waiver provision would permit a statute, similar to the one challenged in *Fullilove*, to survive an "as applied" constitutional challenge would have to await another case. This is that case.

Third, according to *Croson*, *Fullilove* not only declined to address the issue of whether states could implement race-based programs by piggy-backing on the findings made by Congress, this Court held that states could not do so.[13] Thus, the Tenth Circuit Court of Appeals, by upholding the constitutionality of the manner in which the UDOT has implemented the race-based, set-aside program challenged here, has refused to do what this Court – in *Fullilove*, impliedly, and in *Croson*, expressly – said must be done next, that is, determine whether the implementation of a race-based, set-aside program such as was upheld in *Fullilove* will survive constitutional challenge.

Mr. Ellis concedes that his petition is a matter of first impression for this Court, in that it has not been answered fully by either *Fullilove*, or *Croson*. However, for the Tenth Circuit Court to conclude that Mr. Ellis' situation can be dispensed with simply by reference to *Fullilove* is in error. *Fullilove* says only that Congress can do what it did with the adoption of STAA and STURAA. *Croson*, on the other hand, says that the Fourteenth Amendment applies to local governments in the adoption of race-based programs. Unanswered by either, and begging an answer, is the question of whether the Constitution applies to the implementation by a state of a

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[13] *Croson* at 504.

federal program, particularly a federal program based, as are STAA and STURAA, upon general nationwide findings.

In light of the true and direct conflict in the reading of *Fullilove* and *Croson*, by the Tenth Circuit Court of Appeals, this Court must grant Mr. Ellis' petition.

III. THE TENTH CIRCUIT COURT OF APPEALS COMMITTED ERROR BY ITS MISAPPLICATION OF THE DECISIONS OF THIS HONORABLE COURT IN *FULLILOVE V. KLUTZNICK* AND *CITY OF RICHMOND V. J.A. CROSON, CO.* AND IS CLEARLY ERRONEOUS.

By its application of the federal 10% quota, the UDOT acted without regard to the factual situation in Utah. The UDOT failed to determine whether there had been any history of state-sponsored discrimination, failed to consider the racial make-up of Utah, and failed to consider the relevant labor force that was either the "victim" of any alleged discrimination or the beneficiary of the proposed remedy. Simply put, the UDOT failed to comply with the mandate of *Croson*.

Croson compels the UDOT to make specific findings of past state-sponsored discrimination.[14] Yet the District Court concludes that *Fullilove* "suggests that no state findings are necessary."[15]

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[14] *Croson* at 504.

[15] App. at 14.

Since the UDOT – like the City of Richmond – failed to make specific findings of past state-sponsored discrimination, "[i]t is almost impossible to assess whether the . . . [set-aside program] is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way."[16]

The District Court implied that there is a difference between a state "implementing" a program and a state "enacting" a program. Thus, the District Court concludes that while *Croson* will not permit a local government to enact a race-based program without compliance with the Constitution, it is permissible to merely "implement" such a program. Such a conclusion allows local governments to be shielded from the Constitution as a result of the most general, amorphous, nonspecific, national "findings" ascertained by Congress.[17]

Rather than a careful and cautious reading of the very limited language of this Court in *Fullilove*, the District Court adopted a bold and broad interpretation that extends *Fullilove* far beyond its very narrow meaning. The inapplicability of the federal 10% race-based, set-aside provision to the State of Utah – at least the UDOT has set forth no data to demonstrate that the 10% race-based, set-aside is applicable to Utah – and the sanctioning of the use of that 10% quota in Utah by the District Court and

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[16] *Croson*, at 507.

[17] Although the constitutionality of STAA and STURAA are not at issue here, it is worth noting that the definition of a disadvantaged minority was set forth by Congress in 1968.

the Tenth Circuit, is the very abuse cautioned against by Justice Stevens in his dissent in *Fullilove*.[18]

The 10% federal race-based, set-aside program is being implemented in a state which has no documented history of discriminating on the basis of race, in a state with less than 8% minority population, and in a state with less than 2% minority representation in the highway subcontracting industry in which Mr. Ellis is engaged. How such a program can be deemed to be "narrowly tailored" as to both "scope and duration" strains credulity.[19]

The UDOT, by eschewing the federal waiver provision specifically adopted for states such as Utah has failed to "narrowly tailor" the race conscious relief which it has implemented, contrary to both *Fullilove* and *Croson*. As a result, the petition of Mr. Ellis must be granted.

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[18] *Fullilove* at 546.

[19] The timelessness of the UDOT program was revealed during discovery from the Defendants in charge of that program. In their words, "[t]he DBE program is here to stay." Response to First Set of Interrogatories by Defendants, Eugene Findlay, Mario Blanco and UDOT, Answer to Interrogatory Number 25.

CONCLUSION

For all the above reasons, this Court should grant the petition of Mr. Ellis in this matter and review the erroneous decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

STEPHEN B. ELLIS,

Plaintiff,

vs.

SAMUEL SKINNER, in his official capacity as the Secretary, United States Department of Transportation; ROBERT E. FARRIS, in his official capacity as the Deputy Administrator, Federal Highway Administration, United States Department of, Transportation; LOUIS N. MACDONALD, in his official capacity as the Regional Administrator, Federal Highway Administration; EUGENE FINDLAY, individually and in his official capacity as Director of the Utah Department of Transportation, and MARIO BLANCO, individually and in official capacity as Civil Rights Coordinator, Utah Department of Transportation,

Defendants.

Case No. 87-C-0616G

MEMORANDUM DECISION AND ORDER

(Filed — Oct. 15, 1990)

This case involves a challenge to the constitutionality of the federal Disadvantaged Business Enterprise ("DBE") program as applied in Utah. Presently pending

are cross motions for summary judgment under a Joint Stipulation of Facts.[1]

Plaintiff, Stephen Ellis, a white male landscape contractor, seeks a declaratory judgment and permanent injunction against officials of the federal Department of Transportation ("DOT") and the Utah Department of Transportation ("UDOT") on the ground that the federal DBE program as applied by the State of Utah is unconstitutional under the equal protection clause of the Fourteenth Amendment of the United States Constitution. Defendants' Motion for Summary Judgment seeks a ruling that the federal DBE program and Utah's plan participating in that program are constitutional in all respects.[2] For purposes of the cross motions for summary judgment, the parties have stipulated that the federal statutes and implementing regulations are facially lawful and constitutional.[3]

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[1] On August 18, 1988, plaintiff previously filed a motion for summary judgment challenging the constitutionality of the Utah DBE program both on its face and as applied. However, consideration of that motion was deferred pending the Supreme Court's decision in *Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989). After the *Croson* decision, the pending cross summary judgment motions were filed.

[2] The federal defendants, *i.e.* defendants Skinner, Farris, and MacDonald, submitted briefs in connection with their Motion for Summary Judgment. The state defendants, *i.e.* defendants Findlay and Blanco, simply joined in the federal defendants' Motion.

[3] In his Complaint, plaintiff challenges the federal DBE program both on its face and as it has been applied by the State

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BACKGROUND

The federal program for socially and economically disadvantaged business enterprises was promulgated by Congress under Section 105(f) of the Surface Transportation Assistance Act of 1982 ("STAA"), and section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"). As a condition to receiving federal highway funds, STAA and STURAA require states to set aside at least 10% of all federally-aided highway contracts to DBEs.[4] The federal statutes permit states to use a DBE set-aside of less than 10% upon application to and approval by the Secretary of Transportation as set forth in DOT regulations. *See* 49 C.F.R. §§ 23.64(e), 23.65 and 49 C.F.R. Part 23, Subpart D, Appendix D (1989).

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of Utah. The Complaint claims that the DBE program as administered by both federal and state authorities has violated plaintiff's due process and equal protection rights guaranteed by the Fifth Amendment, the equal protection clause of the Fourteenth Amendment, 42 U.S.C. §§ 1983, 2000(d), and Article 1 section 2 of the Utah Constitution.

[4] Section 105(f) of the STAA and section 106(c) of the STURAA both provide:

> *Except to the extent that the Secretary determines otherwise,* not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act (15 U.S.C. section 637(d)) and relevant subcontracting regulations promulgated pursuant thereto.

Pub. L. No. 97-424 § 105(f), 96 Stat. 2097, 2100; Pub. L. No. 100-17 § 106(c), 101 Stat. 132, 145 (emphasis added).

Federal DBE regulations establish a rebuttable presumption that small businesses owned and controlled by women and minorities (including Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and others) are DBEs. 49 C.F.R. § 23.62 (1989). Businesses that are presumed to be disadvantaged are subject to decertification of their DBE status if the participating state determines that they are not in fact disadvantaged. On the other hand, businesses that are not presumed to be disadvantaged may be certified as DBEs by the Small Business Administration or by the state upon a sufficient showing.

Utah participates in the federal DBE program and has adopted a DBE plan that mirrors the federal statutory and regulatory structure in every significant respect, including the annual goal requirement that 10% of all federally funded UDOT contracts be awarded to disadvantaged business enterprises as defined by federal law. Utah has never sought a waiver from the annual 10% set-aside, nor has the State made any findings of past discrimination in Utah's public construction industry. The State has a Civil Rights Coordinator who oversees implementation of the DBE program, and the State has published a directory in which 106 small businesses are listed as eligible to bid as DBEs on federally assisted UDOT construction projects. Some of these DBEs are located outside of the State. Utah's DBE program requires all DBE firms to recertify annually. The Stipulation of Facts does not set forth the percentage of "disadvantaged" transportation contractors that do business in Utah. However, the parties have stipulated that Utah has a minority population that is approximately 7.6% of the general population.

Two DBE goals are used in the DBE program: the annual goal (the 10% goal); and individual contract goals that UDOT establishes for DBE participation as subcontractors in specific prime contracts, which also is usually set by UDOT at 10%. *See* 49 C.F.R. Part 23, Subpart D, Appendix A; UDOT DBE plan, p. 10. Through bid specifications, UDOT advises bidders (prime contractors) of the terms and conditions upon which contracts will be awarded. Determination of whether the prime contractor has complied with the DBE contract goal is made by the UDOT Civil Rights Coordinator and the Assistant Director of UDOT. Plaintiff is only challenging the 10% annual goal of UDOT. The State has frequently granted waivers from the DBE goal on specific projects.

According to the Stipulation of Facts, plaintiff submitted the lowest bids for two subcontracting jobs, but the contracts in each case were awarded to DBEs who submitted higher bids. In the first contract, Albert Lowdermilk, Inc., was awarded the prime contract which contained a DBE requirement of 10%. Plaintiff submitted a subcontract quote to Lowdermilk of $13,250 and a DBE quoted $18,750. Nevertheless, Lowdermilk awarded the subcontract to the DBE in order to fulfill the 10% requirement. In the second contract, W.W. Clyde and Company was awarded the prime contract which also had a DBE requirement of 10%. Plaintiff quoted $131,204 on a subcontract and a DBE quoted $134,286. Again, the DBE was awarded the subcontract. The Stipulation of Facts does not indicate whether plaintiff petitioned the State for a waiver from the 10% set-aside requirement on these particular projects.

ANALYSIS

Plaintiff challenges the constitutionality of Utah's implementation of the DBE program established under STAA and STURAA. Plaintiff requests a declaratory judgment and a permanent injunction against Utah's DBE program until the state makes the findings outlined in the recent Supreme Court case of *City of Richmond v. J.A. Croson, Co.*, 109 S.Ct 706 (1989). In *Croson*, the Supreme Court declared that a minority business program enacted by the city of Richmond, Virginia, was unconstitutional because the city failed to justify the use of suspect classification under equal protection strict scrutiny analysis. Plaintiff seeks to require the State of Utah to follow *Croson* by making findings of state sponsored discrimination and to seek a waiver of the annual 10% DBE set-aside goal from the Secretary of Transportation. The defendants argue, on the other hand, that Utah's DBE program was established pursuant to federal law and is constitutional under the Supreme Court's earlier decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). For reasons explained hereafter, the court agrees with defendants that this case is properly analyzed under *Fullilove*, not *Croson*; that the State is not required to make findings of past discrimination in connection with its participation in the DBE program; and that there is an insufficient factual basis for the court to compel the State to seek a waiver from the 10% set-aside.

I. THE *FULLILOVE* AND *CROSON* DECISIONS

In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Supreme Court rejected a facial challenge to the constitutionality of a federal affirmative action program which

required that 10% of federal funds granted for local public works projects be used to procure services from minority business enterprises ("MBE"). The statute at issue in *Fullilove* was section 103(f)(2) of the Public Works Employment Act of 1977 and attending regulations promulgated by the Secretary of Commerce. Both parties in this case acknowledge that the Department of Transportation's DBE affirmative action program at issue in the instant case was modeled after the MBE program upheld in *Fullilove*.[5]

Foremost in the court's analysis and approval of the 10% set-aside program in *Fullilove* was the fact that it was a program enacted by Congress. The Court stated:

> A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment."

Id. at 472 (citations omitted).

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[5] Section 105(f) the STAA, at issue in this case, was modeled after and has the same legislative purpose as section 103(f)(2) of the Public Works Employment Act of 1977 – the act found to be facially constitutional by the Supreme Court in *Fullilove*. *See* 128 Cong. Rec. H8954 (daily ed. Dec. 6, 1982); 128 Cong. Rec. S14211 (daily ed. Dec. 8, 1982). Both set-aside programs also refer to § 8 of the SBA Act, 15 U.S.C. § 637, regarding the definition of disadvantaged businesses.

After tracing the legislative history of the Commerce Department's MBE program, the Court in *Fullilove* first determined that the remedial objectives of that legislation were within the enforcement power of Congress under section 5 of the Fourteenth Amendment "insofar as that program pertains to the actions of state and local grantees." *Id.* at 478. The Court noted that although Congress did not make specific "findings" of past discrimination in public procurement practices, the Court was "satisfied that Congress had abundant historical basis from which it could conclude" such a finding. *Id.* In an earlier part of Chief Justice Burger's opinion for the *Fullilove* Court, it was noted that the sponsor of the 10% set-aside program had cited Congress to "the marked statistical disparity that in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises, although minorities comprised 15-18% of the population." *Id.* at 459 (citation omitted).[6]

Next, the *Fullilove* Court held that the Congress's use of racial and ethnic criteria, in a "limited way," and "as a

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[6] The recent Supreme Court decision in *Metro Broadcasting, Inc. v. Federal Communication Comm'n*, 111 L.Ed.2d 445 (1990), also upheld the constitutionality of a federal affirmative action program – both facially and as applied. That case involved an FCC program granting preferences to minority broadcast license applications. The Court upheld the FCC's preference policies because "they bear the imprimatur of longstanding congressional support and are substantially related to the achievement of the important governmental objective of broadcast diversity." *Id.* at 485. *Metro Broadcasting* is not directly applicable to the affirmative action program at issue in the instant case inasmuch as the preference program in that case did not entail state participation.

condition attached to a federal grant" was narrowly tailored to the achievement of the remedial objective of the set-aside program. *Id.* at 480. The Court emphasized that the program contained a waiver provision, virtually identical to the waiver provision at issue in the instant case, whereby a state or a general contractor could be given a set-aside goal of less than 10%, upon "demonstration that, despite affirmative efforts, this [10%] level of participation cannot be achieved without departing from the objectives of the program." *Id.* at 482 (citations omitted).[7] The *Fullilove* Court also noted that the set-aside program contained "an administrative mechanism, including a complaint procedure, to ensure that only bona fide MBE's are encompassed by the remedial program," such as in the instant case. *Id.* (citations omitted).

Nine years after the *Fullilove* decision, the Supreme Court decided *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989). In *Croson* the Court held that a set-aside program enacted by the City of Richmond failed to pass

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[7] Justice Powell's concurrence in *Fullilove* also emphasized the importance of the waiver provision:

> Although the set-aside is pegged at a reasonable figure, its effect might be unfair if it were applied rigidly in areas of the country where minority group members constitute a small percentage of the population. To meet this concern, Congress enacted a waiver provision into § 103(f)(2).

448 U.S. at 514 (Powell, J., concurring). *See* footnote 9, *infra*, quoting regulation which sets forth the applicable factors in connection with any application for waiver of the congressionally mandated 10% set-aside requirement, and accompanying footnotes 9 and 10.

constitutional muster under strict scrutiny equal protection analysis. In that case, the City of Richmond had established a 30% set-aside for minority business enterprises on all city construction projects. The plaintiff, Croson, issued a plumbing subcontract bid as part of a renovation project of the city jail. In order to meet the 30% set-aside, the prime contractor determined that the plumbing fixtures would have to be provided by an MBE. One MBE expressed interest in the plumbing subcontract and submitted an untimely bid that was over $6,000 higher than Croson's bid. Croson requested a waiver of the 30% set-aside. The waiver request was denied and the city decided to rebid the project. Thereafter, Croson filed an action under 42 U.S.C. section 1983 arguing that the Richmond ordinance was unconstitutional on its face and as applied.

In holding that Richmond's 30% set-aside program was unconstitutional, the Court in *Croson* distinguished the city's program from the federal affirmative action program upheld in *Fullilove*. The Court noted that states and municipalities have some power to remedy the effects of prior discrimination, 109 S.Ct. at 706, but the Court held that a program of a state or political subdivision is not entitled to the same deference as a congressional program because Congress, unlike the states, has special remedial power under the Fourteenth Amendment:

> That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such

> remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision.

109 S.Ct at 719. In order for states or municipalities to enact affirmative action programs, the *Croson* Court required such entities to make specific findings of past discrimination:

> While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity.

Id. at 727 (citation omitted).

II. UNDER *FULLILOVE*, UTAH IS NOT REQUIRED TO MAKE FINDINGS

Plaintiff argues that in order for Utah's DBE program to be constitutional, the state must comply with the stringent fact finding requirements outlined by the Supreme Court in *Croson* as quoted above. Plaintiff contends that "[w]hen the Utah Department of Transportation chose to implement STAA and STURAA, the baton passed from

the U.S. Government to the State of Utah," and at that instant it became incumbent upon the State to make the findings outlined in *Croson*. Plaintiff's Mem. at 5. Specifically, plaintiff argues that the [sic] before the State can participate in the STURAA program

> it would have to find specific evidence of past state sponsored discrimination and, if it found such discrimination, it would have to then determine that there was a 'compelling governmental interest' in using race conscious relief, and finally, in order to fulfill that governmental interest, it would have to chose a means that was 'narrowly tailored' to remedy the effects of such state sponsored discrimination.

Id. Inasmuch as the State of Utah has not made any of these finding [sic] under *Croson*, plaintiff contends that Utah's DBE program violates the equal protection guarantees of the Fourteenth Amendment.

Defendants argue, on the other hand, that the Supreme Court's decision in *Fullilove*, not *Croson*, controls the decision in this case. Defendants note that the challenged DBE program is congressionally authorized and mandated for all states which are recipients of federal transportation funds, and that Utah's participation in this federally enacted affirmative action program does not convert the program into a state program necessitating independent *Croson*-type findings of past discrimination. The parties have stipulated that Utah's DBE program tracks or complies with the federal DBE statutes and regulation in every significant respect. For purposes of the pending cross motions for summary judgment, plaintiff has further stipulated that the federal DBE statutes

and implementing regulations are constitutional on their face, and that these statutes and regulations were modeled after the substantially similar federal-state 10% set-aside program upheld by the Supreme Court in *Fullilove*. Defendants maintain that "the *Croson* decision reaffirms the constitutionality of the affirmative action program challenged here, and leaves intact the application of *Fullilove* to Congressionally-mandated programs." Defendants' Mem. at 18.

The court agrees with the defendants that Utah's participation in the federally enacted DBE program does not make it incumbent upon the State to make independent factual findings in order for the program to be constitutional. In enacting STAA and STURAA, Congress already has made a nationwide determination that the set-aside program was necessary to help remedy the effects of past discrimination. In *Fullilove*, the Supreme Court indicated that great deference is afforded to Congressional determinations in this regard. 448 U.S. at 472. This deference to congressionally enacted affirmative action programs was reaffirmed by Justice O'Connor's opinion for the Court in *Croson*, and it was the basis from which the program enacted by the City of Richmond in that case was distinguished. 109 S.Ct. at 718-20. This case would be properly analyzed under *Croson* if the State of Utah had enacted a DBE program based on its own initiative. However, the only reason the State has its DBE program is because Congress required it to have such a program as a condition for the State to receive federal highway funds. The City of Richmond in the *Croson* case adopted its 30 percent set-aside program on its own

accord, and not in connection with any federal financing arrangement.

Not only is the affirmative action program in *Croson* distinguishable from the federal set-aside program in place in Utah, but in *Fullilove* the Supreme Court determined that an almost identical set-aside program entailing state participation satisfied equal protection scrutiny. The STAA and the STURAA are Acts of Congress which outline the requirements for interstate transportation projects performed by state entities with the assistance of federal funds. In essence, the Utah Department of Transportation is a junior partner to the U.S. Department of Transportation, and it may properly rely on the findings of Congress. *See Milwaukee County Pavers Ass'n. v. Fiedler,* 710 F.Supp. 1532, 1545-46 (W.D.Wis. 1989) (where state STURAA program was enacted pursuant to a federal-state legislative framework, the state may rely on the findings of Congress).

Although *Fullilove* only involved a facial challenge to the Department of Commerce's set-aside program, there is nothing in *Fullilove* to suggest that states which elect to participate in the program by accepting federal funds are thereby obligated to make findings of past discrimination in addition to the determination already made by Congress and the President. In fact, the Court's emphasis that Congress initiated the set-aside program pursuant to section 5 of the Fourteenth Amendment, and that the Court should afford deference to the unique remedial powers of Congress, suggests that no state findings are necessary. Chief Justice Burger stated for the *Fullilove* Court:

> It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. *Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.*

448 U.S. at 483-84 (citations omitted, emphasis added); *see also id.* at 478 (MBE legislation was lawfully enacted under § 5 of the Fourteenth Amendment "insofar as that program pertains to the actions of state and local grantees").

The court is unaware of any authority in support of plaintiff's contention that states which participate in the federal DBE program are required to make the findings required of the City of Richmond in the *Croson* case. In fact, all other federal courts that have considered this issue have held that such a result would violate the Supreme Court's decision in *Fullilove*, and *Fullilove* is still the law with regard to federally enacted set-aside programs involving state participation. *See Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 1990 U.S.Dist. LEXIS 10010 (August 2, 1990); *Tennessee Asphalt Co. v. Farris*, Civ. No. 3-85-1176, Slip Op. (D. Tenn. June 14, 1990); *Milwaukee County Pavers Ass'n. v. Fiedler*, 731 F.Supp. 1395, 1410 (W.D.Wis. 1990); *Cone Corp. v. Florida Dept. of Transp.*, 1989 U.S. Dist. LEXIS 16743, 16752 (N.D. Fla. August 1, 1990); *Carpenter v. Dole*, 1988 WL 156282

(E.D.N.C.) (June 16, 1988). For the foregoing reasons, this court holds that Utah's DBE program is properly analyzed under *Fullilove*, not *Croson*, and that the State of Utah is not required under the Fourteenth Amendment to make additional findings of past discrimination or otherwise as a participant in this federal-state program.

III. UTAH IS NOT PRESENTLY REQUIRED TO SEEK A WAIVER

As discussed earlier, STAA and STURAA contain a waiver provision whereby a state can petition the Secretary of Transportation for an annual DBE set-aside figure other than the standard 10% amount. A similar waiver provision was regarded as significant in the Supreme Court's decision to uphold the constitutionality of the 10% set-aside program in *Fullilove*. It is undisputed in this case that Utah has not requested a waiver from the annual 10% set-aside requirement.

Plaintiff contends that the waiver provision was made part of the federal DBE program as a constitutional safety valve – to enable states to adjust the set-aside percentage according to their particular circumstances. Thus, plaintiff argues that Utah's adherence to the annual 10% set-aside figure,[8] without regard to the fact that Utah

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[8] Plaintiff does not appear to allege that the set-aside goals for the *specific* projects in which he submitted bids were inappropriately set by the State. *See* 49 C.F.R. § 23.45(g) and Appendix A to § 23.45 (regulations regarding seeking exemption from specific contract DBE goal). Rather, plaintiff's arguments are directed towards the State's failure to seek a waiver from the

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has a low minority population as compared with many other states, renders Utah's DBE program not "narrowly tailored" and unconstitutional as applied.

Plaintiff's argument in [sic] not without some force. At first blush, it would seem reasonable to conclude that Utah should not be required to implement the same degree of affirmative action relief to disadvantaged businesses doing business in this State as compared with those states with a higher per capita minority population. However, plaintiff has failed to demonstrate that the 10% set-aside figure is inappropriate for Utah as determined by the waiver requirements set forth in the federal regulations implementing the federal DBE program – which regulations plaintiff has stipulated are facially valid.

The regulations governing waiver are set forth in in [sic] 49 C.F.R. §§ 23.64(e), 23.65, and 49 C.F.R. Part 23, Subpart D, Appendix D (1989). Regulation 23.65 requires a petitioning state to justify why it should be entitled to a set-aside goal of less than 10%. One clear import of this regulation is that in order for a state to obtain federal approval of a waiver request, the state must demonstrate

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federal government of the *annual* 10% set-aside goal. *See* 49 C.F.R. §§ 23.64(e), 23.65, Appendix D to 49 C.F.R. part. 23, Subpart D (regulations governing waiver of annual state set-aside goal).

that it has been unable to attain the 10% level.[9] In addition, this waiver condition was acknowledged by the

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[9] Regulation 23.65 provides:

Content of justification.

An FHWA or UMTA or FAA recipient requesting approval of an overall goal of less than ten percent shall include information on the following points in its justification. Guidance concerning this information is found in Appendix D.

(a) The Recipient's efforts to locate disadvantaged businesses;

(b) The recipient's efforts to make disadvantaged businesses aware of contracting opportunities;

(c) The recipient's initiatives to encourage and develop disadvantaged businesses;

(d) Legal or other barriers impeding the participation of disadvantaged businesses at least a ten percent level in the recipient's DOT-assisted contracts, and the recipient's efforts to overcome or mitigate the effects of these barriers;

(e) The availability of disadvantaged businesses to work on the recipient's DOT-assisted contracts;

(f) The size and other characteristics of the minority population of the recipient's jurisdiction, and the relevance of these factors to the availability or potential availability of disadvantaged businesses to work on the recipient's DOT-assisted contracts; and

(g) A summary of the views and information concerning the availability of disadvantaged businesses and the adequacy of the recipient's efforts to increase the participation of such businesses provided by the persons and organizations consulted by the recipient under § 23.64(f)(3).

49 C.F.R. § 23.65 (1989); *see also* 49 C.F.R. § 23, Subpart D, Appendix D.

Supreme Court in both *Fullilove* and *Croson*. Chief Justice Burger wrote in *Fullilove* that waiver of the 10% set-aside can be granted upon "demonstration that, despite affirmative efforts, this level of participation cannot be achieved without departing from the objectives of the program." 448 U.S. at 482. Justice Powell's concurring opinion in *Fullilove* stated that "[t]he factors governing issuance of a waiver include the availability of qualified minority contractors in a particular geographic area, the size of the locale's minority population, and the efforts made to find minority contractors." *Id.* at 514. Referring to the *Fullilove* MBE program, Justice O'Connor's opinion in *Croson* explained that "a waiver could be sought where minority businesses were not available to fill the 10% requirement. . . . " 109 S.Ct. at 718. An undisputed fact in this case is that UDOT consistently has been able to meet the 10% set-aside goal.[10] Under these circumstances, requiring the state to seek a waiver would be a futile act.

The only evidence that plaintiff has set forth in urging the court to require the State to seek a waiver is the stipulated fact that Utah's minority population is approximately 7.6% of Utah's total population. This statistic is only relevant insofar as it bears upon the total number of disadvantaged businesses that are available to bid on

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[10] *See* Exhibits 1 and 2 to defendants' Motion for Summary Judgment. Also, on numerous occasions UDOT has granted a prime contractor's application for a waiver from the project set-aside goal based upon the contractor's good faith efforts to achieve the goal. Responses Nos. 5 & 6 by defendants Findlay and Blaco, UDOT, to plaintiff's Second Set of Interrogatories.

UDOT transportation contracts.[11] DBEs include not just businesses owned and controlled by minorities, but also businesses owned and controlled by women and by any other persons who can demonstrate that they are economically and socially disadvantaged. Further, nothing in the statutes or regulations prohibits out-of-state businesses from bidding on projects as DBEs so long as those businesses have been certified as bona fide DBEs by the state receiving the bids. Of course, if out of state DBE bids are unreasonably high, because of added costs or for other reasons, a waiver could be sought and would be granted as to such bids. *See Fullilove*, 448 U.S. at 469-71. Unless and until there is evidence demonstrating that an insufficient number of disadvantaged businesses are available to work on Utah DOT-assisted contracts at the 10% level, this court is of the view that the State is not obligated to seek a waiver from the federal 10% annual set-aside requirement.

As was true of the set-aside program upheld in *Fullilove*, significant provisions of the Utah DBE program help ensure minimum impact upon non-DBEs and that only bona fide subcontractors qualify as DBEs. DBEs interested in federally assisted Utah contracts must certify their DBE status with UDOT annually. Businesses that are not owned and controlled by minorities or

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[11] *Cf. City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706, 725 (1989) ("when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value") (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308, n.13 (1977)).

women can still qualify as a DBE if they can demonstrate that they are economically and socially disadvantaged. Finally, under appropriate circumstances already discussed, the State as well as individual contractors can seek a waiver of the 10 percent set-aside figure. Accordingly, the court concludes that the federal DBE program as applied in Utah is sufficiently narrowly tailored to meet legitimate governmental objectives and that it does not violate the equal protection guarantees of the Fourteenth Amendment.

Based on the foregoing, defendants' Motion for Summary Judgment is GRANTED and plaintiff's Motion for Summary Judgment is DENIED. Counsel for defendants are directed to prepare a form of Judgment consistent with this Memorandum Decision and Order and lodge the same with the court after compliance with local rule 13(e).

IT IS SO ORDERED.

DATED: OCTOBER 15th, 1990.

/s/ J. Thomas Greene
J. THOMAS GREENE
UNITED STATES
DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

STEPHEN B. ELLIS,

Plaintiff,

v.

SAMUEL SKINNER, in his official capacity as the Secretary, United States Department of Transportation; THOMAS D. LARSON, in his official capacity as the Deputy Administrator, Federal Highway Administration, United States Department of Transportation; LOUIS N. MACDONALD, in his official capacity as the Regional Administrator, Federal Highway Administration; EUGENE FINDALY, individually and in his official capacity as Director of the Utah Department of Transportation; and MARIO BLANCO, individually and in official capacity as Civil Rights Coordinator, Utah Department of Transportation,

Defendants.

CIVIL ACTION NO. 87-C-0616G

ORDER OF JUDGMENT

(Filed Nov. 21, 1990)

In accordance with this Court's Memorandum Decision and Order dated October 15, 1990, it is hereby Ordered, Adjudged and Decreed as follows:

1. The motion of the federal defendants dated November 13, 1989, and joined by the state defendant, for summary judgment as to all claims is GRANTED.

2. The plaintiff's motion for summary judgment, dated November 13, 1989, as to all claims is DENIED.

3. The plaintiff's action is DISMISSED with prejudice.

Entered this 21 day of November, 1990:

/s/ J. Thomas Greene
UNITED STATES DISTRICT JUDGE

Agreed and Consented to:

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

STEPHEN B. ELLIS,

Plaintiff,

v.

SAMUEL SKINNER, in his official capacity as the Secretary, United States Department of Transportation; THOMAS D. LARSON, in his official capacity as the Deputy Administrator, Federal Highway Administration, United States Department of Transportation; LOUIS N. MACDONALD, in his official capacity as the Regional Administrator, Federal Highway Administration; EUGENE FINDALY, individually and in his official capacity as Director of the Utah Department of Transportation; and MARIO BLANCO, individually and in official capacity as Civil Rights Coordinator, Utah Department of Transportation,

Defendants-Appellees.

No. 91-4013

(Filed Apr 10, 1992)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT
OF UTAH
(D.C. No. 87-C-0616G)

Submitted on the briefs:

William Perry Pendley and Todd S. Welch, Mountain States Legal Foundation, Denver, Colorado, on the briefs for Plaintiff-Appellant.

Dee V. Benson, United States Attorney; R. Paul Van Dam, Attorney General for the State of Utah; Leland D. Ford, Assistant Attorney General for the State of Utah; John R. Dunne, Assistant Attorney General, Department of Justice, Civil Rights Division, Washington, D.C.; David K. Flynn and Thomas E. Chandler, Attorneys, Department of Justice, Civil Rights Division, Washington, D.C., for Defendants-Appellees.

Before **MCKAY**, Chief Judge, MCWILLIAMS, Circuit Judge, and **BROWN**, District Judge.[1]

MCKAY, Chief Judge.

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[1] The Honorable Wesley E. Brown, District Judge for the United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Appellant Stephen Ellis appeals an order of the district court granting summary judgment in favor of the appellees. On appeal, Ellis raises three arguments. First, he contends that the district court erred in holding that the proper standard for decision is *Fullilove v. Klutznick*, 448 U.S. 448 (1980), rather than *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989). Second, Ellis argues that the district court erred in holding that the Surface Transportation Assistance Act of 1982, Pub. L. No. 97424, § 105(f), 96 Stat. 2097, 2100 (STAA) and the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145 (STURAA), as applied to him by the Utah Department of Transportation (UDOT), are constitutional. Third, he asserts that the district court erred in holding that the UDOT was not required to make findings of past state-sponsored discrimination before implementing the disadvantaged business enterprise (DBE) program. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

BACKGROUND

Ellis, a white male landscape subcontractor, sought declaratory and permanent injunctive relief against officials of the federal Department of Transportation and UDOT on the ground that the federal DBE program as

applied by the State of Utah violates the Equal Protection Clause of the Fourteenth Amendment. Both the appellant and the appellees filed cross motions for summary judgment with the district court. For purposes of the cross motions, the parties stipulated that the federal statutes and their implementing regulations are facially lawful and constitutional.

The DBE program established by STAA, and renewed by STURAA, requires states – as a prerequisite to the receipt of federal funds – to set aside at least ten percent of all federally aided highway contracts to DBEs. Federal regulations require each participating state to set annual goals for DBE participation. 49 C.F.R. § 23.64. The regulations permit a state to set its annual goal at less than ten percent DBE participation if the state can document its efforts to meet the statutory ten-percent requirement and can provide information justifying a lesser goal. *Id.* §§ 23.64, 23.65. The regulations also provide that once the state has set an annual goal, it must set levels of DBE participation for each project. *Id.* § 23.45(g). The state may award a project to bidders that fail to meet the project's DBE goal if the bidder can demonstrate its good faith efforts to obtain DBE participation. *Id.* § 23.45(h).

Utah has chosen to participate in the federal DBE program. For purposes of the summary judgment motion under review, the parties have stipulated that Utah's DBE plan "mirrors the federal statutory and regulatory structure in every significant respect."

Before ruling on the summary judgment motion, the district court found that *Fullilove v. Klutznick*, 448 U.S. 448 (1980) – and not *City of Richmond v. J.A. Croson Co.*, 488

U.S. 469 (1989) – governed this case. Accordingly, the district court concluded that neither the State of Utah nor UDOT was required to make the specific factual findings mandated by *Croson* in order to comply with the Equal Protection Clause of the Fourteenth Amendment. Further, the district court found that, pursuant to federal regulations, the State of Utah could seek a waiver of the ten-percent set aside only if it could demonstrate that it was unable to comply with the ten-percent requirement. Because Utah had been able to comply with the set-aside goal, the district court found that "requiring the State [of Utah] to seek a waiver would be a futile act." Therefore, the court granted summary judgment in favor of the appellees.

DISCUSSION

This appeal turns on the question of whether the district court erred in applying the Supreme Court's decision in *Fullilove* instead of the Court's *Croson* decision to the facts of this case. Ellis asserts that the district court should have applied the rationale in *Croson* and required the State of Utah to make specific factual findings justifying its failure to seek a waiver of the ten-percent set-aside goal.

In *Fullilove*, the Supreme Court examined whether the minority business enterprise (MBE) provision of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (PWEA) violated the Equal Protection

Clause.[2] In rejecting a facial challenge to the constitutionality of the Act, the Court found that the remedial objectives of the legislation were within the enforcement power of Congress under section five of the Fourteenth Amendment. 448 U.S. at 478. Although Congress did not make specific "findings" of past discrimination in public procurement practices, the Court felt "satisfied that Congress had abundant historical basis from which it could conclude" such a finding. *Id.*

Most importantly for purposes of this appeal, the Court emphasized that the MBE program contained waiver and exemption provisions. *Id.* at 482, 487. A waiver provision allowed the grantee of a general contract to request a set-aside goal of less than ten percent upon "demonstration that, despite affirmative efforts, this [ten-percent] level of participation cannot be achieved without departing from the objectives of the program." *Id.* at 482. Because such a waiver provision created a method for rebutting the assumptions underlying the MBE program, the waiver provision was "significant" to the conclusion that the Act passed constitutional muster.[3]

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[2] Similar to STAA and STURAA, the PWEA requires that, absent an administrative waiver, at least ten percent of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members.

[3] In his concurrence, Justice Powell also emphasized the importance of the waiver provision. *See* 448 U.S. at 514 (Powell, J., concurring).

In *Croson*, the Supreme Court examined a set-aside program enacted by the City of Richmond. The City of Richmond established a thirty-percent set aside for minority business enterprises on city construction projects. After the set-aside program had been established, Croson issued a plumbing subcontract bid to a general contractor hired to renovate the city jail. Only one MBE expressed interest in the plumbing subcontract and subsequently submitted an untimely bid that was more than $6,000 higher than Croson's bid. Croson filed a 42 U.S.C. § 1983 action after the city denied his request to waive the set-aside requirement.

Examining the thirty-percent set-aside program, the Court held that the City of Richmond's set-aside plan failed to pass constitutional muster under a strict scrutiny equal protection analysis. In reaching this conclusion, the Court distinguished the city's program from the PWEA, which was upheld in *Fullilove*. In a plurality opinion, Justice O'Connor noted that although states and municipalities have some power to remedy the effects of prior discrimination, 109 S. Ct. at 720, a program of a state or political subdivision is not entitled to the same deference as a congressional program because Congress, unlike the states, has special remedial power under the Fourteenth Amendment. *Id.* at 719. Thus, in order for states or municipalities to enact affirmative action programs, the *Croson* Court required such entities to make specific findings of past discrimination sufficient to demonstrate a compelling governmental interest in apportioning public contract opportunities to minority businesses.

On appeal, Ellis contends that in order for Utah's implementation of the federal program to pass constitutional muster, Utah must comply with the stringent fact-finding requirements outlined in *Croson*. Essentially, Ellis argues that the State of Utah must justify its failure to seek an administrative waiver of the ten percent set-aside goal by satisfying the fact-finding requirements of *Croson*.

To resolve this appeal, we must decide whether failure to seek an administrative waiver places this case squarely within the parameters of the Supreme Court's decision in *Croson*. We begin by emphasizing that Ellis, for the purposes of the summary judgment motion under review, stipulated that both the federal statutes and their implementing regulations are facially constitutional. On appeal, Ellis only contends that Utah's implementation of the federal plan – specifically Utah's failure to seek a waiver from the ten-percent annual goal is unconstitutional. Therefore, we must decide whether Utah's failure to seek a waiver is equivalent to a local government enacting its own set-aside program, thus implicating the fact-finding requirements of *Croson*.

Our decision turns on the procedures for seeking and obtaining an administrative waiver. STAA and STURAA both contain a waiver provision whereby a state can petition the Secretary of Transportation for an annual DBE set-aside figure other than the standard ten-percent goal.[4] The regulations governing the procedure for obtaining an administrative waiver can be found in 49 C.F.R. §§ 23.64(e), 23.65, and 49 C.F.R. Part 23, Subpart D,

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[4] Both parties agree that Utah has not requested a waiver from the annual 10% set-aside requirement.

Appendix D. Section 23.64(e) requires that a state take several steps to seek a waiver, including compliance with the requirements of § 23.65. Section 23.65 requires a state to include with its waiver request information justifying the state's entitlement to a set-aside goal of less than ten percent.

In its well-reasoned opinion, the district court found that "[o]ne clear import of this regulation [§ 23.65] is that in order for a state to obtain federal approval of a waiver request, the state must demonstrate that it has been unable to attain the 10% level." After reviewing § 23.65 and Appendix D, we agree. Appendix D specifies that

> [t]he justification has two basic elements. First, *the recipient should show that it is doing as much as it can to increase disadvantaged business participation to at least a ten percent level.* Second, the recipient should show that, given the availability of disadvantaged businesses, the requested goal is the reasonable expectation for the level of disadvantaged business participation that these efforts are likely to obtain.

(Emphasis added.) Thus, § 23.65 clearly requires that a state demonstrate its inability to obtain a ten-percent level of participation by DBEs before it can qualify for a waiver of the ten-percent set-aside goal. In addressing this same issue, the Sixth Circuit stated:

> Further, while it is true that Tennessee may opt not to participate in the federal program at all, if the state decides to accept highway funds, it must meet the 10% DBE requirement, or fulfill the federal requirements for a variance by showing 10% participation is not possible despite good faith efforts. In other words, and contrary

> to the plaintiffs' frequent assertions, Tennessee has no discretion to *either* accept the 10% DBE requirement *or* apply for a variance. Rather, it may only apply for a variance by establishing under federal standards that it cannot comply with the 10% requirement.

Tennessee Asphalt Co. v. Farris, 942 F.2d 969, 975 (6th Cir. 1991); *see also Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir.), *cert. denied*, 111 S. Ct. 2261 (1991).[5] Because it is undisputed that Utah has been able to meet the ten-percent DBE set-aside requirement, we follow the Sixth and Seventh Circuits and hold that Utah, given the federal regulations, would not be able to obtain a waiver of the ten-percent set-aside goal.

When Utah "fails" to seek a waiver, it simply follows the procedures set forth in the federal statute's implementing regulations. Moreover, because Ellis stipulated

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[5] Plaintiff argues that a State is not to apply the ten-percent set-aside goal unless the State finds that the purposes of the STAA are directly applicable to it. This argument misconstrues the nature of Congress's statutory mandate. Contrary to plaintiff's characterization of the statutory DBE program, Congress affirmatively mandated that participating states meet the ten-percent requirement, but left open the possibility for an administrative waiver:

> Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under [the Act] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

101 Stat. at 145.

that these regulations are constitutional, we are compelled to conclude that the State of Utah is simply obeying a congressional command. We agree with the Seventh Circuit's analysis in *Milwaukee County*:

> Insofar as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations. . . . If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.

922 F.2d at 423; *see also Tennessee Asphalt*, 942 F.2d at 975 ("since 'Congress [can] mandate state and local compliance with [a] set-aside program under its § 5 power to enforce the Fourteenth Amendment,' *Croson*, 488 U.S. at 487, 109 S. Ct. at 718, a state's compliance with the mandates of a federal scheme is nothing more than compliance with federal law"). Thus, the *Croson* decision does not apply to this appeal, and the State of Utah is not required to make factual findings to justify its inability to seek a waiver of the ten-percent set-aside goal.

AFFIRMED.

No. 92-81

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN B. ELLIS, PETITIONER

v.

ANDREW H. CARD, JR.,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTION PRESENTED

The Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100 (1983), and the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 145-146 (1987), together with their implementing regulations, required States receiving federal highway funds to allocate a portion of those funds to disadvantaged-business enterprises (DBEs), including primarily minority- and women-owned businesses. The question presented is whether the State of Utah's implementation of that federally mandated DBE program violated the Equal Protection Clause.

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SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-35) is reported at 961 F.2d 912. The opinion and judgment of the district court (Pet. App. 1-24) are reported at 753 F. Supp. 329.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1992. The petition for a writ of certiorari was filed on July 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1983, Congress enacted the Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 97-424, 96 Stat. 2097 (1983), which authorized federal funds for interstate highway construction projects. Section 105(f) of that Act provided that "[e]xcept to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 96 Stat. 2100.[1] Under the STAA, the term "socially and economically disadvantaged individuals" presumptively included Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans. 48 Fed. Reg. 33,442 (1983).

The STAA expired after four years, and in 1987 Congress enacted the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132 (1987). Section 106(c) of the STURAA established a ten-percent disadvantaged-business enterprise (DBE) program similar to that previously established in the STAA. 101 Stat. 145-146.[2]

Under the United States Department of Transportation (DOT) regulations applicable to STURAA, a

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[1] Section 105(f) was modeled after Section 103 of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116-117 (1977), which created a minority business enterprise (MBE) program at the Department of Commerce. See *Fullilove* v. *Klutznick*, 448 U.S. 448, 453-454 (1980). This Court upheld the facial constitutionality of the MBE provision of the Public Works Employment Act in *Fullilove* v. *Klutznick*.

[2] The STURAA expired in 1991, and that year Congress enacted the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991), which contains a similar ten-percent DBE goal. § 1003(b), 105 Stat. 1919-1921.

"disadvantaged business" is defined as a small business concern at least 51% owned and managed by "socially and economically disadvantaged individuals." 49 C.F.R. 23.62. The regulations define "socially and economically disadvantaged individuals" by establishing a rebuttable presumption that such individuals include women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian-Indian Americans, or any other minorities or individuals found to be disadvantaged by the Small Business Administration. *Ibid.*

The regulations provide that, in appropriate circumstances, non-minority firms that are owned by socially and economically disadvantaged individuals may be included in the set-aside program as well. See 49 C.F.R. 23.62 ("Recipients [of federal funds] * * * may determine, on a case-by-case basis, that individuals who are not [members of the designated groups] are socially and economically disadvantaged."); see also 49 C.F.R. Pt. 23, Subpt. D, App. C. Likewise, the regulations provide that minority-owned firms may be denied preferential treatment under certain circumstances. 49 C.F.R. 23.69. Each recipient of federal highway funds is required to establish a "challenge procedure" permitting third parties to challenge an individual's entitlement to disadvantaged status. 49 C.F.R. 23.69(a). Businesses that are owned by persons presumed to be disadvantaged may lose their presumptive DBE status if it is determined that the owners are not in fact socially and economically disadvantaged. *Ibid.*

b. The DOT regulations require States receiving federal highway funds to set annual goals for the use of DBEs in federally assisted highway construction projects. 49 C.F.R. 23.64. The STAA and the STURAA each established a nationwide goal of ten-percent participation by DBEs, but the regulations permit States to deviate upward or downward from the ten-percent annual

goal in certain circumstances. 49 C.F.R. 23.64(d) and (e). In setting its annual goal, a State must consider the number and types of contracts to be awarded, the number of DBEs available to compete for those contracts, and the results of past efforts to contract with DBEs. 49 C.F.R. 23.45(g)(5); see also 49 C.F.R. 23.45(g)(1).

A State seeking approval of an annual goal of less than ten percent must submit a "justification" setting forth specific information, including efforts taken to locate DBEs and to make such businesses aware of contracting opportunities. 49 C.F.R. 23.65. Federal officials may approve the lower goal if they find that the recipient is making "all appropriate efforts" to increase DBE participation to the ten-percent level, and the lower goal represents a reasonable expectation for DBE participation given the availability of DBEs presently eligible to work on federally assisted projects. 49 C.F.R. 23.66(b); see also 49 C.F.R. Pt. 23, Subpt. D, App. D ("Justification for Requests for Approval of Overall Goals of Less Than Ten Percent."). If a State is unable to meet its goal using DBEs from the same geographic area in which it generally seeks contractors or subcontractors, it must expand its search to a "reasonabl[y] wider geographic area." 49 C.F.R. 23.45(g)(8).[3]

c. The State of Utah elected to receive federal highway funds under STAA and STURAA, and accordingly the State became a participant in the federal DBE program. Utah's DBE plan "mirrors the federal statutory and regulatory structure in every significant respect." Pet. App. 28. Utah's plan established a ten-percent annual goal, and the State has never sought approval for an

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[3] The regulations also require States to establish DBE-participation goals for each individual prime contract. 49 C.F.R. 23.45(g)(2)(ii) and (7). Petitioner does not challenge that aspect of the federal DBE program.

annual goal of less than ten percent. *Id.* at 32 & n.4. The parties stipulated that Utah has never made any findings of past discrimination against DBEs in Utah's public construction industry, and that in 1984 minorities made up approximately 7.6% of the State's total population. C.A. App. 245-246. According to petitioner, less than two percent of the firms available for subcontract work in Utah are DBEs. Pet. 6.

2. Petitioner is a white male landscape subcontractor. Pet. App. 2. In 1986, petitioner submitted a quote of $13,250 for landscaping work on a federally assisted highway project sponsored by the Utah Department of Transportation (UDOT). That project was subject to the ten-percent DBE goal, and the subcontract was awarded to Milsap Landscaping, a DBE, which had submitted a quote of $18,750 for the same work. *Id.* at 5; C.A. App. 247. Similarly, in 1988, petitioner submitted a quote of $131,204 for landscaping work on another UDOT project. That project also was subject to the ten-percent DBE goal and the landscaping subcontract was therefore awarded to Gallegos & Shelton, a DBE, which had submitted a quote of $134,286. Pet. App. 5; C.A. App. 247.

3. In July 1987, petitioner filed an action for declaratory and injunctive relief against officials of the United States Department of Transportation and the Utah Department of Transportation (UDOT), alleging that the federal DBE program as applied by Utah violated the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 27-28. Subsequently, the parties filed cross-motions for summary judgment, including a joint stipulation of facts. Petitioner stipulated that the federal statutes and implementing regulations are facially lawful and constitutional. *Id.* at 28.

In October 1990, the district court issued its decision granting the defendants' motion for summary judgment and denying petitioner's motion for summary judgment.

Pet. App. 1-22. The court rejected petitioner's argument that the case was governed by *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), and thus that the State had to make specific findings of discrimination to implement the federal program. Pet. App. 11-16. The court concluded that the case was properly analyzed under *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), which involved a challenge to a similar federal program, and not *Croson*, which involved a program enacted by a city. Pet. App. 16. The court explained that "[t]his case would be properly analyzed under *Croson* if the State of Utah had enacted a DBE program based on its own initiative. However, the only reason the State has its DBE program is because Congress required it to have such a program as a condition for the State to receive federal highway funds." *Id.* at 13. The court added that "there is nothing in *Fullilove* to suggest that states which elect to participate in the program by accepting federal funds are thereby obligated to make findings of past discrimination in addition to the determination already made by Congress and the President." *Id.* at 14.

The district court also held that Utah's adherence to a ten-percent DBE goal did not render the program unconstitutional as applied, despite the State's low minority population. Pet. App. 16-20. The court noted that there was no evidence that Utah was unable to meet its ten-percent goal, and thus the State would not have been entitled to obtain a waiver of the ten-percent requirement under the applicable DOT regulations. *Id.* at 17-20. Moreover, petitioner had stipulated that those regulations were facially valid. *Id.* at 17. Accordingly, the court concluded that the State was under no obligation to seek a waiver. *Id.* at 19.

4. The court of appeals affirmed. Pet. App. 25-35. Noting that petitioner had conceded the facial validity of the applicable federal statutes and regulations, the court

concluded that petitioner claimed only "that Utah's implementation of the federal plan—specifically Utah's failure to seek a waiver from the ten-percent annual goal [—] is unconstitutional" under this Court's *Croson* decision. *Id.* at 32. In the court's view, the dispositive question in determining whether *Croson* applied in this context was whether the State's failure to seek a waiver was the equivalent of a local government's decision to enact its own racial set-aside program. *Ibid.*

In analyzing that question, the court of appeals first noted that the applicable DOT regulations permit issuance of waivers only where a State is unable to attain the ten-percent goal. Pet. App. 32-33. Utah has consistently achieved that goal, and thus would not be entitled to a waiver under the terms of the regulations. *Id.* at 34. Thus, Utah's "fail[ure]" to obtain a waiver was merely the result of the DOT regulations that petitioner had stipulated to be facially valid. *Id.* at 34-35. Relying on *Milwaukee County Pavers Ass'n* v. *Fiedler*, 922 F.2d 419 (7th Cir.), cert. denied, 111 S. Ct. 2261 (1991), and *Tennessee Asphalt Co.* v. *Farris*, 942 F.2d 969 (6th Cir. 1991), the court reasoned that the State's decision to comply with federal law could not give rise to a violation of the Fourteenth Amendment. Accordingly, the court of appeals concluded that "the *Croson* decision does not apply to this appeal, and the State of Utah is not required to make factual findings to justify its inability to seek a waiver of the ten-percent set-aside goal." Pet. App. 35.

ARGUMENT

This case does not involve a challenge to the constitutionality of the federal DBE program as a whole; petitioner has stipulated that the federal statutes and regulations are lawful and constitutional on their face. Pet. App. 32. Petitioner also acknowledges that Utah implemented the federal statutes and regulations in accor-

dance with their terms. Pet. 6. Nevertheless, petitioner argues that Utah's adherence to the facially valid provisions of the federal program was unlawful.[4] There is no conflict among the circuits on that question, however, nor is the decision below inconsistent with any decision of this Court. Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 7-18) that the court of appeals erred in concluding that this case is governed by *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). Instead, petitioner argues, the State of Utah was not permitted to implement the DBE program created by STAA and STURAA until the State had satisfied the stricter standards applicable to state-sponsored racial set-aside programs as set forth in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989). As petitioner concedes, however, the question whether *Croson* or *Fullilove* applies to a State's implementation of a federally mandated DBE program is one "of first impression" in this Court. Pet. 7, 15. Moreover, the court of appeals' decision on this issue is in accord with the decisions of both other courts of appeals that have addressed this question.[5]

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[4] Petitioner also asserts (Pet. 8 n.3) that "[t]he UDOT program is strictly a race-based program since the only basis for qualifying as a so-called 'DBE' is race." That assertion is incorrect. Under STURAA, women-owned business enterprises (WBEs) were presumptively entitled to DBE treatment. 49 C.F.R. 23.62. Similarly, under STAA, separate percentage goals were set for WBEs. See 45 Fed. Reg. 21,187 (1980) (codified at 49 C.F.R. 23.45(g)(4)); see also C.A. App. 247 (noting separate one-percent WBE goal). Moreover, under both STURAA and STAA, individuals who were not members of groups presumptively entitled to preferential treatment could nonetheless qualify for DBE status on a case-by-case basis. 49 C.F.R. 23.62; 48 Fed. Reg. 33,442 (1983).

[5] The same issue is currently pending before the Second Circuit in *Harrison & Burrowes Bridge Constructors, Inc.* v. *Cuomo*, No. 91-9090, and *United Fence & Guard Rail Corp.* v. *Cuomo*, No. 91-

In *Milwaukee County Pavers Ass'n* v. *Fiedler*, 922 F.2d 419, cert. denied, 111 S. Ct. 2261 (1991), the Seventh Circuit addressed a similar challenge to Wisconsin's implementation of the STURAA program. In that case, plaintiffs conceded the validity of the federal statute and regulations both on their face and as applied. 922 F.2d at 423. In view of that concession, the court of appeals rejected plaintiffs' arguments that Wisconsin was required to make its own findings of prior discrimination or seek a waiver of the ten-percent goal before implementing the set-aside program. The court stated:

> These arguments * * * are inconsistent with the contractors' decision not to challenge the validity of the federal or statute or regulations. Insofar as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations. * * * If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.

Id. at 423.

Similarly, in *Tennessee Asphalt Co.* v. *Farris*, 942 F.2d 969 (6th Cir. 1991), the plaintiffs challenged Tennessee's implementation of the STAA program, but conceded the facial validity of the federal statute and regulations. 942 F.2d at 972. Plaintiffs argued that Tennessee

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9098 (argued together Mar. 2, 1992). The district court in those cases rejected arguments similar to those made by petitioner here. *Harrison & Burrowes Bridge Constructors, Inc.* v. *Cuomo*, No. 89-CV-447 (N.D.N.Y. Oct. 1, 1991), and *United Fence & Guard Rail Corp.* v. *Cuomo*, No. 88-CV-306 (N.D.N.Y. Oct. 1, 1991).

violated the Equal Protection Clause by adhering to the ten-percent set-aside prescribed in the statute in the absence of any evidence of past discrimination in the State. *Ibid.* Citing *Milwaukee Pavers*, the Sixth Circuit rejected this argument, stating:

> [W]hile it is true that Tennessee may opt not to participate in the federal program at all, if the state decides to accept highway funds, it must meet the 10% DBE requirement, or fulfill the federal requirements for a variance by showing 10% participation is not possible despite good faith efforts. In other words, * * * Tennessee has no discretion to *either* accept the 10% DBE requirement *or* apply for a variance. Rather, it may only apply for a variance by establishing under federal standards that it cannot comply with the 10% requirement. Thus, every aspect of participation in the federal highway program is mandated by Congress.

Id. at 975.

The decision below is entirely consistent with *Tennessee Asphalt* and *Milwaukee Pavers*. Moreover, it does not conflict with this Court's holding in *Croson*. *Croson* involved the constitutionality of a 30% minority set-aside program enacted by the City of Richmond to remedy discrimination in the local construction industry. Applying strict scrutiny, the Court invalidated the city's set-aside program, ruling that it was not justified by a compelling state interest because the city had failed to identify sufficient evidence of past discrimination. 488 U.S. at 498-506. In addition, the Court held that the 30% set-aside was not narrowly tailored to achieve the stated remedial purpose because it was "not linked to identified discrimination in any way." *Id.* at 507.

The set-aside program invalidated in *Croson* was the result of a purely local initiative, and accordingly that

case provided no opportunity to address the question of the standards applicable to a State's implementation of a federally mandated racial classification in a federally assisted program. That question therefore remains an open one after *Croson*. Given the absence of any circuit conflict on that question, no further review is warranted.[6]

2. Petitioner challenges Utah's failure to seek a waiver of the annual ten-percent DBE goal (Pet. 7-12), asserting that the district court's interpretation of the waiver provision rendered it "of no force and effect." Pet. 11. What petitioner ignores, however, is the fact that Utah could not have qualified for a waiver, because the DOT regulations permit a State to select a goal of less than ten percent only if the State can demonstrate that the ten-percent level is not reasonably attainable. 49 C.F.R. 23.66(b); 23 C.F.R. Pt. 23, Subpt. D, App. D; 48 Fed. Reg. 33,443, 33,452 (1983). It is undisputed that Utah has been able to attain ten-percent DBE participation in its highway contracts, and thus it would have been futile for the State to apply for a waiver. Pet. App. 34.

In essence, petitioner's real quarrel is with the waiver procedure itself, not with the State of Utah's decision

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[6] Petitioner also asserts that the States may not "implement race-based programs by piggy-backing on the findings made by Congress." Pet. 15 (citing *Croson*, 488 U.S. at 504). Petitioner's reliance on this aspect of *Croson* is misplaced. The Court in *Croson* rejected the proposition that a state or local government could implement its own set-aside program in reliance on congressional findings (see 488 U.S. at 504), but nothing in the Court's opinion indicates whether the same rule would apply to a State that chooses to implement a federally mandated DBE program based upon the type of congressional findings found sufficient in *Fullilove*. *Croson* simply does not address the validity of a State's implementation of a federally mandated racial set-aside program, and thus it is not controlling in this context.

not to seek a waiver pursuant to that procedure. But by stipulating that the DOT regulations establishing the waiver procedure are facially valid, and by directing his challenge solely against the State's implementation of the federal program, petitioner has eschewed any opportunity to challenge the validity of the waiver procedure in this Court. Cf. *Milwaukee Pavers*, 922 F.2d at 425. Accordingly, petitioner's challenge to the State's failure to seek a waiver is without merit, and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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